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January 10, 2001

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-B204
Washington, DC 20554

Re: GN Docket No. 00-185, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*

Dear Ms. Salas:

Enclosed for filing are one original and four copies of the *Reply Comments of SBC Communications Inc. and BellSouth Corporation* in the above-captioned matter.

Yours truly,

Colin S. Stretch

Enclosures

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Inquiry Concerning High-Speed	)	GN Docket No. 00-185
Access to Internet Over	)	
Cable and Other Facilities	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC. AND BELLSOUTH CORPORATION

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EXECUTIVE SUMMARY

The Commission must move quickly in this proceeding. The telecommunications industry is in the midst of a capital market melt-down that threatens to infect the entire economy. The uncertain status of broadband regulation is depriving telecommunications companies of both the will and the capital that are necessary to deploy broadband infrastructure. The deployment of that infrastructure is crucial to the development of the new economy, and should not be delayed any longer.

The Commission must also move decisively. The cable industry's duplicity in this very proceeding – arguing that cable modem service is a "cable service" while elsewhere seeking to avoid cable franchise fees that flow from that characterization – highlights the regulatory gamesmanship that the Commission's inaction has encouraged. If the Commission fails to adopt, in Commissioner Powell's words, a "consistent and principled approach" that "harmonize[s] regulatory treatment in a manner consistent with converged technology," regulation of this all-important industry will end up fragmented and balkanized, subject to a hodgepodge of widely different mandates established by the Federal Trade Commission, the Department of Justice, state regulatory commissions, local municipalities, and – only last, and least – the Commission itself.

As we discussed in our opening comments, the most "consistent and principled approach" is to regulate all broadband services – regardless of their transmission medium – as "information services" under Title I. That means dismantling the whole array of Title II regulations that currently bind telephone-company provision of broadband services. Title I treatment would leave decisions in the broadband marketplace where they should be – in the hands of competitive actors, responding to competitive forces.

No carriers, and certainly not the telephone companies, possess the bottleneck control that is legally and economically necessary to compel regulation of broadband services under Title II. If the Commission nonetheless chooses to continue the full array of Title II regulation of telephone company DSL services, then in the interests of regulatory parity it must, in Chairman Kennard's words, "go to the telephone world . . . and just pick up this whole morass of regulation and dump it wholesale on the cable pipe."

The Commission's third option is to invoke either Title I or Title II to revive an intermediate structure of regulation of the sort that the Commission developed in its *Computer II* proceedings. If the Commission takes this course, it must remove the current restrictions on ILEC provision of broadband that are not part of such a *Computer II*-type regime – including line sharing, loop conditioning, loop qualification, and related collocation mandates, as well as the separate-affiliate conditions imposed through the section 271 and merger-approval processes.

However the Commission chooses to proceed, it should promptly issue a notice of proposed rulemaking and act on it without delay to formulate a technology-neutral policy that addresses *today's* market and *today's* competitive realities. Neither state regulatory commissions nor federal antitrust authorities have the Commission's expertise or its broad authority to establish a comprehensive, uniform framework of regulation or deregulation for this very important new market. As Commissioner Powell recently explained:

> We must . . . work to harmonize regulatory treatment in a manner consistent with converged technology and markets. . . . Additionally, we must recognize that the Digital Migration involves every segment of the communications industry (*i.e.*, telephone, cable broadcast, wireless, and satellite) and none should be examined in isolation. We must drive our learning and experience across all sectors of our regulatory authority and try to maintain a consistent and principled approach.

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REPLY COMMENTS OF SBC COMMUNICATIONS INC. AND BELLSOUTH CORPORATION

Despite the broad array of commenters participating in this proceeding, four pivotal facts are not in serious dispute.

First, the high-speed digital broadband market is a new market, separate and distinct from both the low-speed, analog telephone market and the multi-channel video distribution market that the cable industry has long dominated. This Commission, the Department of Justice, and the Federal Trade Commission (FTC) have all reached that same conclusion.[1]

Second, there is no "bottleneck" to this market, and certainly not one controlled by telephone companies. In addition to cable and digital subscriber line (DSL), satellite and fixed

[1] *See infra* p. 8 & n.24.

wireless are emerging as viable broadband providers.[2] Many commenters therefore conclude – as the Commission itself has apparently concluded – that the broadband market is competitive.[3]

Third, despite its competitive structure, the incumbent cable operators currently dominate the broadband market.[4] Cable operators today serve almost three out of every four residential broadband subscribers; the two largest cable modem providers – AT&T's Excite@Home and Time Warner's Road Runner – have far more residential subscribers *than all DSL providers combined.*[5] Cable incumbents boast that their (broadband) cable plant supplies an inherently

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[2] *See* Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, 15 FCC Rcd 11857, 11865, ¶ 19 (2000) ("*Fixed Wireless Competition Order*") (identifying "a continuing increase in consumer broadband choices within and among the various delivery technologies – xDSL, cable modems, satellite, fixed wireless, and mobile wireless"); *see also* Seventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, FCC 01-1, ¶ 77 (rel. Jan. 8, 2001) ("*Seventh Video Competition Report*") ("satellite providers are developing ways to bring advanced services to their customers"); Starband at ii (Starband currently offers commercial "two-way, high-speed consumer satellite service").

[3] *See, e.g.*, Cox at 12; Starband at 17; USTA at 6; AT&T at 36; Cablevision at 3-4; Charter at 4; Cox at 12; Comcast at 8; CSE Foundation at 4; RCN at 6; *accord* Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, 15 FCC Rcd 9816, 9866, ¶ 116 (2000) (identifying "actual and potential competition" to cable broadband); *Fixed Wireless Competition Order*, 15 FCC Rcd at 11864, ¶ 18 ("An increasing number of broadband firms and technologies are providing growing competition to incumbent LECs and incumbent cable companies, apparently limiting the threat that they will be able to preclude competition in the provision of broadband services.").

[4] *E.g.*, WorldCom at ii ("Cable broadband is the clear national leader in terms of deployment to homes."); Earthlink at I (cable-based services make up 84 percent of the broadband Internet access market); OpenNet Coalition at 4-5 ("the cable industry controls the vast majority of the high-speed Internet access market").

[5] *See* SBC/BellSouth Attach. A; *see also, e.g.*, *Seventh Video Competition Report* ¶ 52 ("the number of DSL subscribers is significantly less than the number of cable broadband subscribers"); Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket No. 98-146, FCC 00-290, ¶¶ 71, 72 (rel. Aug. 21, 2000) ("*Second Advanced Services Report*") (as of December 31, 1999, cable had 87.5% of all residential "advanced services" subscribers and 78% of all residential "high-speed" subscribers).

more suitable foundation than the (narrowband) voice network on which to erect new broadband Internet access capabilities.[6] If there is any antecedent market power that the Commission must worry about here, it is the incumbent cable operators' overwhelming power in the market for multichannel video distribution.

Fourth, there is at this point no uniform national regulatory policy in place to govern this extremely important new market. Cable, the dominant provider of the new service, is hardly regulated at all with respect to these new services. Cable's non-dominant telephone-company competitors, by contrast, are mired in the morass of Title II, sections 251 and 271, and merger-related conditions that we described in our opening comments. No one has any clear idea how, or if, fixed wireless and satellite providers of broadband services will (or won't) be regulated as their services join the competitive fray.

Nothing in either the 1934 Communications Act or the 1996 Telecommunications Act requires, or even permits, this upside-down state of regulatory affairs, in which the non-dominant providers in an altogether new market are regulated much more heavily than the dominant ones. The cable industry earnestly urges the Commission to reaffirm the regulatory status quo. But no torturing of the definitions of "common carriage," "cable service," or "ancillary service" can save the current regulatory imbalance from ultimate repudiation in the courts as arbitrary, capricious, and contrary to law. The question is not whether the Commission must establish a uniform regulatory policy for this industry, but when it will do so. It should do so now.

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[6] *See, e.g.*, AT&T 1999 Mid-Year Report at 2, *at* http://www.att.com/ir/pdf/99my.pdf ("copper wires that carry a narrow stream of information [are] fine for voice but too slow for the high-speed services in our future"); *CableLabs Launches New Phase of Home Networking Project*, Business Wire, May 8, 2000 ("'[t]he fundamental advantage of cable is its bandwidth,'" quoting Tony Werner, executive vice president, AT&T Broadband); *see also infra* pp. 6-7 & nn.15-17.

DISCUSSION

I. THOUGH THE EMERGING MARKET FOR BROADBAND ACCESS IS COMPETITIVE, CABLE REMAINS DOMINANT.

The incumbent cable operators attempt to persuade the Commission to do nothing, because their broadband dominance will be fleeting. DSL-based services are ascendant, the cable operators imply, and cable is in relative decline.[7] But the cable industry's own publication reports that cable "added more [broadband subscribers] in the first three-fourths of [2000] . . . than DSL providers have installed in the last four years."[8] That same publication pegs cable's current subscribership lead at three to one.[9] The Commission's own numbers reveal that in the first six months of 2000 alone *cable extended its broadband lead over DSL by as much as 60 percent.*[10] The FTC concluded less than a month ago that "DSL still lags substantially behind

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[7] *E.g.*, Comcast at 9, 38; NCTA at 46; AT&T at 44. The cable operators place great stock in the telephone companies targets, but "[t]he Bells have . . . struggled to reach their own subscriber goals in recent quarters." John Borland, *Phone Companies Face Critical Months for DSL*, CNET News.com, Jan. 4, 2001, *at* http://news.cnet.com/news; *see also* Simon Romero, *D.S.L. Service for Linking to Internet is Problem Ridden*, N.Y. Times, Dec. 28, 2000, at C1 (describing service and installation problems associated with DSL-based Internet access).

[8] *Handicapping the Cable-DSL Horse Race*, Cable Datacom News, Dec. 4, 2000 ("*Cable-DSL Horse Race*"); *see also* SBC/BellSouth Attach. A. Cable modems would have grown even more rapidly in 2000 but for "a temporary interruption in the supply of cable modems" that has since been resolved. *See* Excite@Home Press Release, *Excite@Home Reports Second Quarter 2000 Results*, July 19, 2000; *Q3 DOCSIS Modem Shipments Top 2 Million*, Cable Datacom News, Dec. 4, 2000.

[9] *Cable-DSL Horse Race*, *supra* n.8 ("by November 2000 there were 4.2 million installed cable modem customers in the U.S. and Canada, compared to 1.4 million residential DSL subscribers"); *see also* Borland, *supra* n.7 ("by the end of the third quarter of 2000, . . . [a]bout 2.9 million subscribers had cable modem service, compared with . . . 936,000" residential DSL subscribers); *Seventh Video Competition Report* ¶ 52 ("By June 2000, there were 820,000 DSL subscribers compared to more than 2.3 million cable Internet access subscribers.").

[10] *See* Report at Tables 1-3, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000* (Ind. Anal. Div., FCC, Oct. 2000) (between December 1999 and June 2000, cable extended its lead over DSL in high-speed lines over 200 Kbps in at least one direction from 1,044,391 lines to 1,298,391 lines, an increase of 24 percent; for lines over 200 Kbps in both

cable modem services in market penetration and acceptance."[11] AT&T's own source predicted that by the end of 2000 cable modem service would be available to 70 percent more households than DSL.[12] To the extent incumbent LECs enjoy any market power at all, it is "*not* in the broadband services marketplace."[13]

The cable industry argues, however, that phone companies alone must remain tightly regulated in this new market because they might "leverage" their voice networks to gain a dominant position. To the extent that remains a concern, however, the appropriate regulatory

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directions, cable's lead grew from 693,721 lines to 1,108,336 lines, or 60 percent; in residential and small business high-speed lines over 200 Kbps in at least one direction, cable's lead grew from 1,112,843 to 1,408,438 lines, or 27 percent). While the Commission has identified one analyst that expects DSL to be on competitive par with cable in the next two years, *see Seventh Video Competition Report* ¶ 52 & n.189, most analysts do not expect that to happen until at least 2004. *See* SBC/BellSouth at 5 & n.14. Trade publications have reached similar conclusions. *See, e.g., Cable-DSL Horse Race*, *supra* n.8 ("For the last four years industry pundits have trumpeted DSL's pending triumph over cable modems. . . . It hasn't happened. Cable operators . . . continue to crush their DSL counterparts in the residential broadband market."); Borland, *supra* n.7 (according to predictions, the phone companies will not "overtake cable in the residential space in the next five years").

[11] Complaint ¶ 13, *In re America Online, Inc. and Time Warner Inc.*, Docket No. C-3989 (FTC filed Dec. 14, 2000) ("*AOL/TW Complaint*"); *accord* Competitive Impact Statement at 8, *United States v. AT&T Corp. and MediaOne Corp.*, Civ. No. 00-CV-1176 (D.D.C. filed May 25, 2000) ("*DOJ Competitive Impact Statement*").

[12] *See* Comments of AT&T Corp. at 33 n.107, *Joint Application of NorthPoint Communications, Inc. and Verizon Communications for Authority To Transfer Control*, CC Docket No. 00-157 (FCC filed Oct. 2, 2000) (citing Cameron Crouch, *Broadband Is Coming at High Speed,* PC World, Jan. 12, 2000: "By the end of this year, 41 percent of U.S. households will have access to cable modem service but only 24 percent will have access to digital subscriber line."); *see also* Sanford C. Bernstein & Co. and McKinsey & Co., Inc., *Broadband!*, at 30-31 & Exhs. 22, 26 (Jan. 2000) (forecasting that cable would reach 63,680,000 households, and DSL 38,560,000, by year end 2000) ("*McKinsey Broadband Report*"); *cf.* OpenNet Coalition at 4 ("DSL . . . has technical limitations which make it unavailable to many Americans"); *Fixed Wireless Competition Order*, 15 FCC Rcd at 11870, ¶ 29 ("[f]orty percent to fifty percent of local lines in the National Exchange Carrier Association pools exceed three miles, at or beyond DSL's practical limit of 3.4 miles") (footnote omitted).

[13] Cox at 14 (emphasis added).

response is – self-evidently – to continue regulating the *voice* service, and the narrowband *voice* spectrum on the telephone company's wire, *not* the new, broadband service, and *not* the broadband spectrum on the wire.

In any event, if there is to be a leverage problem it is going to be cable's. The cable industry has informed everyone else outside the Commission that it is *cable itself* that is advantageously positioned to leverage *cable's* dominant incumbent position in *cable's* existing video markets,[14] in order to secure *cable's* dominance of the broadband market. Cox openly declares that it has "'outlined a clear strategy: Leverage the power of our delivery network to offer customers not just cable television, but advanced services including . . . high-speed Internet access.'"[15] AT&T has justified investing upwards of $100 billion in cable companies[16] on the

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[14] *See Seventh Video Competition Report* ¶ 5 ("Cable television still is the dominant technology for the delivery of video programming to consumers . . . . As of June 2000, 80 percent of all MVPD subscribers received their video programming from a franchised cable operator."); *see also* Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 15 FCC Rcd 10927, 10930, ¶ 12 (2000) ("relatively few cable operators face effective competition"); WorldCom at 4 ("Cable providers currently enjoy de facto geographic monopolies.").

[15] Cox Communications Press Release, *Cox Communications Updates Investors on Successful Rollout of New Services*, Dec. 12, 1997 (quoting Jim Robbins, Cox President and CEO); *see also* Fitch, IBCA, Investext Rpt. No. 2308549, Cox Communications, Company Report (Oct. 2, 2000) ("Generally, [Cox's] strategy is to leverage its substantial cable television infrastructure system and customer base to offer a variety of new services that would include digital cable, [and] high-speed data access . . . ."); *accord Seventh Video Competition Report* ¶ 11 ("Cable operators continue to expand the broadband infrastructure that permits them to offer high-speed Internet access."); Cablevision Systems Corp. News Release, *Cablevision's Rainbow Media and Primedia's New York Magazine Announce Launch of New York's Most Powerful Internet Destination*, Mar. 28, 2000 ("[t]his partnership is an extension of Cablevision and Rainbow's strategy to utilize our state-of-the-art platform to create and deliver content that is meaningful to our customers, whether they are using a computer or watching television") (internal quotation marks omitted); *see also supra* pp. 2-3 & n.6.

[16] *See* Elizabeth Douglass, *AT&T Cuts Its Dividend for First Time Ever*, L.A. Times, Dec. 21, 2000, at C1 ("Under Chairman C. Michael Armstrong, AT&T ran headlong into the cable

ground that this would permit AT&T to leverage cable's broadband video position into broadband Internet services.[17] The cable industry expects its leveraging to solidify cable's dominance of existing video markets, as well. As the chairman of AT&T's own Excite@Home explains, "[t]he first reaction of the cable operators" to competitors' demand for broadband Internet access "is to protect their legacy network."[18]

In a final effort to downplay their own dominance of the broadband market, several cable operators try to lump narrowband (dial-up) data services together with broadband service in a single market.[19] Their retained economists argue that, "in the absence of any significant content especially tailored for broadband delivery,"[20] dial-up service will continue to constrain broadband pricing. Even the most cursory comparison of the actual pricing of dial-up versus broadband services reveals this to be incorrect. Ordinary dial-up phone service – which allows only slow, narrowband Internet access – costs an average of $10-$20 per month,[21] while

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business, spending more than $100 billion to buy [TCI and MediaOne] to become the nation's largest cable operator.").

[17] *See* AT&T-MediaOne Merger Prospectus Registration Statement, Schedule S-4, at II-5 (SEC filed Aug. 27, 1999) ("[T]he combined company's ability to offer customers 'one-stop shopping' for all of their video entertainment, information, Internet and communication needs will be a significant advantage to AT&T following the merger. . . . [U]tilizing the capabilities of AT&T's marketing force along with the bundling of various service offerings could provide operating efficiencies as well as improved customer acquisition.").

[18] Richard P. Cole, *Sinking or Swimming With Streaming Video*, Online Exclusive, Dec. 8, 2000.

[19] *E.g.*, AT&T at 47; Cox at 8; NCTA at 40; Cablevision at 2, 9.

[20] NCTA Attach. A at 10 (Charles River Report).

[21] A first line to the home usually costs around $20/month. *See, e.g.*, http://www.swbell.com/Products_Services/Residential/ProdInfo_1/1,1973,74-0-2-3-,00.html#4, visited Jan. 8, 2001 (pricing residential lines in one Southwestern Bell Telephone Company state). Second lines usually cost around $10/month. *See, e.g.*, http://www.pacbell.com/Products_Services/Residential/ProdInfo_1/1,1973,69-3-,00.html, visited Jan. 8, 2001. Numerous ISPs offer free dial-up Internet access. *See, e.g.*,

consumers readily pay around $40-a-month or more for much faster DSL or cable modem service.[22] There is no basis whatsoever to believe that a 5 percent increase in the price of DSL or cable modem service would result in significant user migration back to dial-up residential voice lines.[23] To the contrary, this Commission, the Department of Justice, and the FTC have all already – and correctly – concluded that broadband occupies an entirely distinct market of its own.[24]

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http://dl.www.juno.com/get/web, visited Jan. 8, 2001; http://www.netzero.com, visited Jan. 8, 2001; http://www.altavista.com, visited Jan. 8, 2001; http://freelane.excite.com, visited Jan. 8, 2001.

[22] *See* Wireless DSL Consortium, *Broadband Wireless Business Opportunity*, *at* http://www.wdslconsortium.com/opportunity.html, visited Jan. 8, 2001; AT&T Corp., *Common Questions About AT&T@Home*, *at* http://www.athome.att.com/faq.html#howmuch, visited Jan. 8. 2001; Comcast, *About Comcast @Home*, *at* http://www.comcast.com, visited Jan. 8, 2001; BellSouth Fast Access Internet Service, *at* http://www.fastaccess.com, visited Jan. 8, 2001; SBC Global Network, *Digital Subscriber Line*, *at* http://www.pacbell.com/DSL, visited Jan. 8, 2001; *Seventh Video Competition Report* ¶ 53.

[23] *See* United States Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* § 1.11 (1997).

[24] *E.g.*, *Fixed Wireless Competition Order*, 15 FCC Rcd at 11867, ¶ 23 ("the competitive nature of *the broadband market*," along with "the number of consumer broadband options within the various broadband technologies" and "price competition . . . *in that market*," means that neither incumbent LECs nor incumbent cable operators will "dominate *the market*") (emphases added); *accord DOJ Competitive Impact Statement* at 9 ("A relevant product market affected by [the AT&T/MediaOne] transaction is the market for aggregation, promotion, and distribution of broadband content and services."); *AOL/TW Complaint* ¶ 21 ("The relevant product market in which to assess the effects of the proposed merger is the provision of residential broadband internet access service."). These authorities also refute CompTel's assertion (at 12) that a "DSL market" exists separate and apart from a "cable market."

II. REGULATORY CLASSIFICATIONS ARE BASED ON THE NATURE OF A SERVICE, NOT WHO PROVIDES IT.

A service is regulated based on what it offers to the consumer, not based on the name or history of the entity that provides it. Most commenters accept that principle.[25] The Commission itself has endorsed it in theory for four decades.[26] When the Commission has failed to honor that principle in practice, Congress or the courts have reaffirmed it instead.[27]

Various cable operators question that principle by claiming that broadcast, cable, and DBS are regulated differently, even though they "provide similar or even identical services to

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[25] *E.g.*, Earthlink at 45 (the differences between cable operators and telephone companies in the broadband context – "the nature of the facilities used" and their "identities and corporate histories" – are "entirely irrelevant to the regulatory classifications in the Act"); CompTel at 35 (the Act's definitions "are not based on the type of facility used to provide the service"); OpenNet Coalition at 12-13 ("the broadband services at issue here must be defined in the same way whether provided over a copper telephone wire or a coaxial cable wire;" it is the "type of service," not who happens to provide it, that is "determinative"); Ascent at 4 ("And as the Commission has declared, it is the mandate of Congress that the 'classification of a provider should not depend on the type of facilities used.'"); Qwest at 8 ("There is simply no reason why a cable provider's cable modem service should be treated any differently from a regulatory perspective than the DSL service by an ILEC.").

[26] SBC/BellSouth at 8-10; *see generally* Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11548, ¶ 98 (1998) ("*Report to Congress*") ("We are mindful that, in order to promote equity and efficiency, we should avoid creating regulatory distinctions based purely on technology.").

[27] *See Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (reversing Commission decision to regulate dark fiber as a common carrier offering even though BOCs had deployed it on a private carriage basis); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995) (reversing Commission decision to treat PCS and cellular differently, even though they were "expected to compete for customers on price, quality, and services"); H.R. Rep. No. 103-111, at 259-60 (1993) (directing the Commission to "achieve regulatory parity among [commercial mobile] services that are substantially similar") (discussing Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, tit. VI, § 6001(a), 107 Stat. 312 (1993)); *see also* H.R. Rep. No. 98-934, at 43 (1984) ("[The] distinction between cable services and other services offered over cable systems is based upon the nature of the service provided, not upon a technological evaluation of the two-way transmission capabilities of cable systems.") (discussing 1984 Cable Act, Pub. L. No. 98-549, 98 Stat. 2779 (1984)).

consumers."[28] But in fact, the history of the Commission's regulation of "subscription television services" establishes precisely the opposite. After attempting for a time to maintain artificial regulatory distinctions between identical services, the Commission – with prodding from the courts and Congress – ended up with a clean, principled division between advertiser supported (free) broadcasting on the one hand, and subscription-based services on the other.[29] Almost *all* subsequent regulation and legislation has aimed to promote regulatory parity in the subscription market between cable and its principal competitor, DBS.

The cable operators next argue that section 251(c)(3) of the Act places special obligations on incumbent LECs; that the 1996 Act therefore does not "favor[] parity of statutory or regulatory responsibilities"; and that the Commission accordingly lacks discretion to treat broadband transmission over coax like it treats the same service over copper.[30] As discussed in our opening comments, however, the single pivotal legal issue that the Act does not resolve, and that the Commission must, is whether, or to what extent, a broadband Internet access provider that *self-provides* transmission must also be a common-carriage provider of that broadband transmission to others.[31] In other words, should the underlying facilities-based transport portion of a broadband service be classified, along with the rest of the service, under Title I, or should it

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[28] Comcast at 24; *see* NCTA at 65-67.

[29] *Compare* Further Notice of Proposed Rulemaking and Notice of Inquiry, *Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) To Provide for Subscription Television Service*, 3 F.C.C. 2d 1, 17-18, ¶ 47 (1966) (defining subscription video services as a "broadcast" service), *with* Report and Order, *Subscription Video*, 2 FCC Rcd 1001, 1001, ¶ 5 (1987) (reversing earlier position and finding that subscription video services, including DBS, are not "broadcast" services), *aff'd National Assn. for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).

[30] *E.g.*, Comcast at 20; *see* AT&T at 88.

[31] SBC/BellSouth at 15-17.

be separated out as an independent Title II service? If it is the former – as SBC and BellSouth have argued – then section 251(c)(3), like the remainder of Title II, is simply irrelevant, except insofar as a broadband provider affirmatively chooses to offer stand-alone broadband transport as a Title II service.

The Commission has concluded that the statute leaves the Commission enough room to go either way on that all-important question.[32] But what it does not do is leave the Commission the room to go one way for DSL and the other for cable. In the Commission's words, broadband transmission "provided through cable modems is no different from the broadband capability provided over other facilities," and the "classification of the service should [not] vary with the facilities used to provide [it]."[33]

Finally, the cable operators argue that telephone companies may be regulated differently because they have not taken any investment risk in the deployment of DSL.[34] That is nonsense. To begin with, the Communications Act provides no "investment at risk" exception for disparate regulatory treatment. And in any event, this argument is based on the false premise that the ILECs' network facilities and DSL technologies were developed and deployed under rate-of-return regulation.[35] Like most other large LECs, SBC and BellSouth have been under price caps

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[32] *Id.* at 15 & n.38.

[33] Amicus Curiae Br. of the FCC at 25, *AT&T Corp. v. City of Portland*, No. 99-35609 (9th Cir. filed Aug. 16, 1999); *see also* Remarks of Commissioner Michael K. Powell before The Progress & Freedom Foundation, *The Great Digital Broadband Migration*, Washington, D.C. (Dec. 8, 2000) (Commission should adopt a "consistent and principled approach" to broadband regulation that "harmonize[s] regulatory treatment in a manner consistent with converged technology").

[34] *E.g.*, AT&T at 99-100; NCTA at 66.

[35] *E.g.*, AT&T at 99.

for a number of years. In 1999 alone, ILEC shareholders – not ratepayers – footed the bill for more than $3 billion in DSL-related network upgrades, with an additional $5.5 billion expected by the end of 2001.[36] The deployment of SBC's Project Pronto will cost its shareholders $6 billion.[37] As the D.C. Circuit has explained, "investors rather than ratepayers have borne the risk of loss on [incumbent LEC] assets."[38]

III. TITLE I SHOULD GOVERN ALL BROADBAND INTERNET ACCESS.

Broadband Internet service offers "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[39] It is therefore an "information service" subject to Title I of the Act. Commenters agree.[40] There is less consensus, however, on the more significant question: whether broadband Internet service providers that *self-provide* their own high-speed transport offer, in addition to a Title I "information service," a Title II "telecommunications service."[41]

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[36] *McKinsey Broadband Report* at 84.

[37] *SBC Receives FCC Approval to Activate Project Pronto's Neighborhood Broadband Gateways*, Business Wire, Sept. 8, 2000. CompTel argues that open access rules do not in fact hinder investment, and points to SBC's Project Pronto as a purported example. CompTel at 30. But that "example" is not remotely on point. As SBC has explained to the Commission, the Project Pronto architecture is *not* subject to the Commission's open access rules. Moreover, SBC deployed Project Pronto on the understanding that, as an overlay network, it would *not* be subject to the regulatory obligations that burden its legacy telephone network.

[38] *Illinois Public Telecomm. Ass'n v. FCC*, 117 F.3d 555, 570 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1046 (1998). Even under rate of return regulation, it was the investor, not the state or the ratepayer, that paid for building out the network.

[39] 47 U.S.C. § 153(20); *see* SBC/BellSouth at 14.

[40] AT&T at 20; Cox at 26; Comcast at 15; CompTel at 38.

[41] *Compare, e.g.*, Cox at 35-36 (the Commission has already concluded that facilities-based broadband service providers offer only a Title I "information service") *and* AT&T at 22 ("information service" and "telecommunications service" are mutually exclusive, so if cable

So far, the Commission has stated only that the classification of service offerings "combining communications and computing components" by "facilities-based providers" is a "complicated" question, and that "[o]ne could argue that [the provider] is furnishing raw transmission capacity to itself."[42] As we argued in our opening comments, the Commission *may* resolve this question by concluding that cable Internet service providers do in fact offer both an "information service" subject to Title I and a "telecommunications service" subject to Title II. That conclusion leads to the "open access" model advocated by so many commenters.[43]

But under Commission precedent, the Commission *must* reach that result *only* if it determines that cable operators have "market power" in the broadband Internet access market. That is the only circumstance in which the public interest would "*require*[] common carrier operation" of the cable operators' broadband facilities.[44] Otherwise, the Commission may leave it to the provider to choose how to package its services – *i.e.*, as a bundle of content and transmission subject only to Title I, as private carriage also subject to Title I, or as including a separate and unadorned carriage offering available to the general public and therefore subject to Title II. That is a choice the Commission has given to many other operators, in many other

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operators offer the former, they cannot offer the latter) *with, e.g.*, Verizon at 10-11 (self-providers of transport necessarily offer a "telecommunications service").

[42] *Report to Congress*, 13 FCC Rcd at 11530, ¶¶ 59-60, 11534, ¶ 69.

[43] Ascent at 9; CompTel at 35-47; Earthlink at 19-45; *see also* SBC/BellSouth at 25-42.

[44] Memorandum Opinion and Order, *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21589, ¶ 9 (1998) (emphasis added); *see* Memorandum Opinion, Declaratory Ruling, and Order, *Cox Cable Communications, Inc., Commline, Inc. and Cox DTS, Inc.*, 102 F.C.C.2d 110, 120-22, ¶¶ 22-28 (1985) ("*Cox Cable*"); *see also National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 644 n.76 (D.C. Cir. 1976) (noting that Commission may "impos[e] [upon a carrier] requirements which . . . ma[ke] them common carriers") ("*NARUC I*"); *AT&T Submarine Systems*, 13 FCC Rcd at 21587-88, ¶ 6 (a telecommunications service is a transmission service provided on a common carrier basis).

contexts, as competitive market circumstances allow.[45] And in those situations, common carriage rules kick-in only if the provider itself *elects* to "make capacity available to the public indifferently."[46]

The best answer to the question of how to treat broadband self-providers – as a matter both of economic policy and statutory mandate – is to conclude that cable does not have sufficient market power to warrant mandatory treatment as a common carrier. And if cable is to be given that treatment, on the ground that cable faces sufficient actual and potential broadband competition, ILEC DSL, the non-dominant competitor, must be given it too.[47] The Commission certainly has the authority to give incumbent LECs the choice of whether to provide broadband

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[45] *See* Report and Order, *Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference*, 90 F.C.C.2d 676, 706-09, ¶¶ 78-84 (1982) (DBS can position services under Title II or III); Report and Order, *Revisions to Part 21 of the Commission's Rules Regarding Multipoint Distribution Service*, 2 FCC Rcd 4251, 4251-53, ¶¶ 1-16 (1987) (fixed wireless carriers can offer services under Title II or Title III); Memorandum Opinion, Order and Authorization, *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d 1238, 1261, ¶ 56 (1982) (satellite carriers can choose whether to position services as common carriage); *accord* 47 U.S.C. § 571(a)(3) (telephone company can choose to offer video programming under Title VI or as an open video system); *see also Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1468 (D.C. Cir. 1984) ("[r]apid technological advances, demand shifts, and changes in entrepreneurial judgments" caution against "an inflexible regulatory regime"); FCC Staff Report, *Broadband Today*, at 42 (Oct. 1999) (noting that market forces might compel cable operators to offer unadorned carriage); *see generally* SBC/BellSouth at 8-9 & nn.18-23, 17 & nn.43-48.

[46] *E.g.*, Cable Landing License, *Cable & Wireless PLC*, 12 FCC Rcd 8516, 8522, ¶¶ 14-15 (1997); *Cox Cable*, 102 F.C.C.2d at 121, ¶ 25; *see also* Comcast at 40 ("While some entities may *choose* to conduct their businesses as common carriers, government imposition of common carriage as the sole business or regulatory model is neither necessary nor desirable.") (emphasis added).

[47] *See* Earthlink at VI (to conclude that cable is an information service only, the Commission would have to "abandon" the concept that *any* broadband provider is a common carrier).

transmission on a common carrier basis.[48] And treating ILECs less favorably than cable in *this* market is flatly irrational.

Deregulation across the board is the policy most consistent with both the level of competition in the broadband market and the 1996 Act's goals of market-based regulation and technological neutrality. Where a market is competitive, the Commission's best course is to avoid intervention. The robust facilities-based competition that characterizes the broadband market is far more able than any regulator to ensure consumer welfare. It is especially important that the Commission rely upon market forces where, as here, competitors are making large investments and deploying innovative technologies to meet new demand. As the Commission has explained, "competition, not regulation, holds the key to stimulating further deployment of advanced telecommunications capability."[49]

A broad range of commenters endorse these principles.[50] As these commenters explain, the gains to be achieved by imposing regulation on the broadband Internet market are limited, for "[a] regulatory approach is incapable of accounting for the fast-paced competition now underway

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[48] *See* Cable Landing License, *AT&T Submarine Systems, Inc.*, 11 FCC Rcd 14885, 14885-86, ¶ 2 (1996) (the Commission may "change the regulatory status" of a common carrier service based on market conditions); *see also Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (upholding *Computer II* decision to detariff service elements that had been treated as common carrier offerings; further investigation had revealed them not to be common carriage communications offerings within the meaning of the Act); *Wold Communications*, 735 F.2d at 1468 (upholding FCC decision to allow the outright sale of satellite transponders that had been used to provide common carriage; FCC made a "modest adjustment" to changed market circumstances).

[49] *Second Advanced Services Report* ¶ 246.

[50] AT&T at 42, 66; Verizon at 23; Charter at 20, 27; Cox at 13, 19; NCTA at 21-22; USTA at 10; Cablevision at 12; CompTel at 29-30; Allegany at 12; ACT at 4; CIX at 5; Gemini at 5; Information Technology Industry Council at 3-4; *see* SBC/BellSouth at 13.

among multiple facilities-based providers."[51] The costs, by contrast, are substantial, as regulation "deter[s] . . . investment" and enmeshes the Commission and competitors "in a legal and logistical quagmire."[52] Moreover, regulation necessarily involves "[p]icking winners and losers," a "particularly inappropriate role for the government in the dynamic Internet marketplace."[53] As Starband, an emerging satellite-based provider of broadband access, explains, regulation of the broadband market has "the result of stifling exactly the sort of innovation and growth of competitive intermodal services that the Commission has always sought to promote."[54]

The cable operators agree wholeheartedly, of course, insofar as open-access regulation might be extended their way. Open-access regulation of the kind imposed on ILEC DSL would be an "overwhelming regulatory burden ill-suited for the swiftly changing Internet."[55] It "would have a crippling effect on the development of Internet-related industries."[56] It is "almost impossible to see how the inherently rigid and slow-moving regulatory process can keep pace with the needs of the Internet," so application of open access principles to cable broadband would lead to "chaos and waste."[57] Proponents of open-access regulation, they suggest, are

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[51] Charter at 29.

[52] NCTA at 35-36; *see* Comcast at 27.

[53] NCTA at 52.

[54] Starband at iii.

[55] Charter at iv.

[56] NCTA at 26.

[57] AT&T at 80.

"more interested in hampering" their competitors' "ability to compete" than in fostering consumer choice.[58]

Except – cable operators assure the Commission – there is no crippling, no chaos, no waste, and no hampering of competitors, when these same regulations continue to be applied to DSL. Unable to back up that argument with reference to any aspect of the broadband market itself, cable operators argue that the continued regulation of their competitors' broadband service is necessary to promote competition in the less-competitive narrowband (voice) market. What that argument comes down to is the suggestion that access to the *broadband* spectrum on telco wires is necessary to ensure that CLECs will compete in offering *narrowband* (*i.e.*, voice) service.[59]

This gets things exactly backwards. Decades of antitrust precedent, Commission regulation, and congressional pronouncement have affirmed precisely the opposite approach – mandating open access to the "bottleneck," "essential," or competitively "necessary" network elements and services, while deregulating the competitive ones. Thus, AT&T may still be able to claim that it cannot compete effectively in *voice* markets without access to the *voice* channel in ILEC loops. But AT&T's argument does not pass the laugh test when it asserts that AT&T cannot compete effectively without access to the *broadband* channel in ILEC loops. AT&T is already, and by a wide margin, the leading provider of broadband Internet access.[60] And AT&T

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[58] AT&T at 78; Charter at 30.

[59] AT&T at 94-100.

[60] *See* SBC/BellSouth Attach. A. AT&T is also aggressively rolling out its own fixed wireless system, and recently claimed to be "on track to have 1.5 million fixed wireless subscribers by year-end 2000." Fifth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, FCC 00-289, App. E at 3-4 (rel. Aug. 18, 2000).

has forged a series of joint-marketing partnerships with other providers to create the bundles of voice and broadband services that some consumers may desire.[61] Regulation of DSL is by no means necessary to this process, and it is a distinct impediment to open competition in the broadband market.[62]

The D.C. Circuit stressed exactly this point just this week in its opinion on review of the SBC/Ameritech merger. As the court explained, "[i]f an ILEC has no market power over advanced services" – as is undoubtedly the case – regulation of its broadband offerings is a "*non sequitur*."[63]

IV. IF DSL IS TO BE REGULATED UNDER TITLE II, SO TOO MUST CABLE INTERNET ACCESS.

Several commenters mistakenly suggest that if open-access regulation is extended to cable, it must then be extended to all other broadband technologies, too.[64] Under the

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[61] *See, e.g.*, AT&T Press Release, *AT&T and Cablevision to Create High-Value Telecommunications Bundle for New York Metropolitan Area Customers*, Feb. 23, 2000; AT&T Press Release, *AT&T And Cablevision Systems Corporation Unveil Plans To Give Customers "Something Extra,"* May 4, 2000; AT&T Press Release, *AT&T and Time Warner Cable Announce Joint Marketing Agreement*, Mar. 7, 2000.

[62] CompTel's assertion (at 25) that open access for cable is necessary to create a wholesale competitor to the incumbent LECs is nonsensical. Because incumbent LECs and cable operators offer several virtually identical services over their respective networks, facilities-based competition will necessarily arise between them (and the other facilities-based providers in the marketplace), regardless of whether they are forced to act as wholesalers.

[63] *Association of Communications Enters. v. FCC*, No. 99-1441, slip op. at 11 (D.C. Cir. Jan. 9, 2001). The court also assumed that broadband transmission that is not bundled with content (*i.e.*, "advanced services") is a telecommunications service and must therefore be regulated under Title II. *See id.*, slip op. at 4, 10. But that assumption has nothing to do with the question presented in this proceeding: whether self-provided broadband transmission that *is* bundled with content should instead be regulated under Title I. *See* SBC/BellSouth at 15-18.

[64] *See* NCTA at 27-28 (if "separation" of transmission is required, "*all* information service providers would be common carriers . . . – whether provided over cable, DBS, MMDS, or other facilities"); Comcast at 35; Cox at 13, 37.

Commission's *NARUC I* precedent, the Commission must examine whether cable operators in particular, as the dominant broadband providers, have sufficient broadband market power to be required to offer common carriage even when others are not.[65] It is the converse proposition that is correct: Any regulation applied to *non-dominant* providers must surely be applied to the dominant provider as well.

A. The Commission Has Authority To Regulate Cable Broadband As A "Telecommunications Service" Under Title II.

The Commission currently views the DSL-enabled transmission path underlying incumbent LEC broadband Internet services as a "telecommunications service" under the Act.[66] As the Ninth Circuit recognized, the exact same logic applies to cable broadband: "to the extent that [a cable Internet service provider] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act."[67]

The Commission has already defined cable broadband (like DSL) to be an "advanced service" – *i.e.*, one type of "telecommunications service."[68] And in its *Advanced Services Order*

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[65] *See* SBC/BellSouth at 15 & n.40, 18; *cf.* OpenNet Coalition at 5 ("immediate Commission action should be limited to the dominant player[:] cable broadband").

[66] *See, e.g.*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24030-31, ¶ 37 (1998) ("*Advanced Services Memorandum Opinion and Order*") ("We note that BOCs offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services."); SBC/BellSouth at 18 & n.49.

[67] *See AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000).

[68] *See Second Advanced Services Report* ¶ 29 ("Cable companies offer advanced services, most notably high-speed Internet access services, using cable modem technologies."); *Advanced*

on Remand,[69] the Commission concluded that broadband Internet service over DSL is both "telephone exchange service" and "exchange access" (both of which are "telecommunications services"[70]). If that is so, it must be so for broadband Internet service over cable as well, for both services do precisely the same thing.[71]

Cable operators argue that they have never before sold "transport stripped of content to anyone," so they can't be required to do so now.[72] But the plain fact is that cable broadband service *can be* – and often *is* – used as a pure transport service, whatever other incidents may be bundled with it. A cable-modem subscriber is free to use the connection for nothing but non-cable e-mail, for example, or for downloading content from non-cable (*e.g.*, Disney or MSN) sites. Given how limited cable's own digital Internet content offerings remain, that is indeed how the service is mainly used. The Commission, Congress, and the courts have many times concluded that where services offered over a cable system have the earmarks of a common carrier offering, they should be regulated as such.[73]

Services Memorandum Opinion and Order, 13 FCC Rcd at 24029, ¶ 35 ("advanced services are telecommunications services"); SBC/BellSouth at 26-27 & nn.73-74.

[69] Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, 386, ¶ 2 (1999) ("*Advanced Services Order on Remand*").

[70] *See* 47 U.S.C. § 153(16), (47); *see, e.g.*, First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15679, ¶ 356 (1996) ("*Local Competition Order*"); Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3911-12, ¶ 484 (1999) ("*UNE Remand Order*"); *Advanced Services Order on Remand*, 15 FCC Rcd at 391-92, ¶ 16.

[71] *See* SBC/BellSouth at 27-28.

[72] NCTA at 11; AT&T at 73.

[73] *See, e.g.*, Decision, *Application of Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd, Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359, 361 (D.C. Cir. 1963); H.R. Rep. No. 98-934, at 27-29 (noting the "two-way capacities of cable systems to provide